

Date: July 22, 1997

Case No.: 95-INA-669

In the Matter of:

EVA JOSOVITZ,
Employer

On Behalf Of:

MARIA GRZADZIEL,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5)(A) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 13, 1996, Eva Josovitz ("Employer") filed an application for labor certification to enable Maria Grzadziel ("Alien") to fill the position of Cook Kosher (AF 4-5). The job duties for the position are:

Prepare, season and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls, Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred.

The requirements for the position are four years of high school and two years of experience in the job offered.

The CO issued a Notice of Findings on April 28, 1995 (AF 46-49). The CO proposed to deny labor certification on two grounds. First, the CO questioned whether the job offered constitutes permanent, full-time employment. Second, the CO found that the Employer's requirement of a high school education is unduly restrictive.

Accordingly, the Employer was notified that it had until June 2, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 15, 1995 (AF 50-54), the Employer stated that the Alien would be required to cook two lunches, four afternoon meals, and six dinners each day. Furthermore, the Employer explained that the Alien would be required to prepare 10 snacks per day, as well as purchase the foodstuffs, clean the kitchen, and set the table. As such, the Employer argued that the job opportunity constitutes permanent, full-time employment. Finally, the Employer stated that she would reduce the requirement of a high school education in accordance with the CO's instructions.

The CO issued the Final Determination on June 19, 1995 (AF 56-58), denying certification because the Employer failed to establish that the job opportunity constitutes permanent, full-time employment.

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

On June 30, 1995, the Employer requested review of the Denial of Labor Certification (AF 59-72). On September 11, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer submitted a Brief on October 16, 1995.

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 47-48). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In its rebuttal, the Employer asserted that she and her husband work from 10:00 a.m. until 5:00 p.m. and often work past 5:00 p.m. (AF 54). She further asserted that there are three school-age children who attend school during the day and engage in after-school activities until 5:30 p.m. The Employer provided a typical menu, along with preparation time for each meal. The Employer noted that each meal is provided for five family members and dinner is prepared for six members. In summary, the Alien would be required to prepare 10 snacks daily, Monday through Thursday, and 12 snacks on Friday. The Employer stated that it takes 45 minutes to prepare the snacks. Furthermore, the Alien would be required to prepare two lunches daily, which takes one hour to prepare, and four afternoon meals daily, which takes 45 minutes to prepare. Finally, the Employer stated that the Alien would be required to prepare six dinners daily, which takes approximately two hours to prepare. In addition, the Employer stated that the Alien would be required to clean the kitchen, plan the menus, purchase the foodstuffs, and set the table. Finally, the Employer stated that her mother previously performed these duties.

As indicated, the issue here is whether or not the CO's conclusion, that full-time employment is not being offered, is a reasonable inference from these facts. We think not. The Employer has indicated the conditions of employment on the Application for Alien Employment Certification form ETA 750, under penalty of perjury pursuant to 28 U.S.C. § 1746 (see 20 C.F.R. § 656.20(c)(9)). These conditions of employment state that 40 hours of employment are being offered per week at a wage of \$12.81 per hour. There is no evidence in the record to the contrary. Essentially, the dispute comes down to the Employer's assertion that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that the meal in question takes a lesser amount of time. The CO's conclusion that, in fact, the duties described could not constitute 40 hours of work, are speculative at best.

Therefore, we find that the CO's conclusion that full-time employment is not being offered is not supported by substantial evidence. Therefore, we find that this matter must be remanded for the Certifying Officer to permit advertisement of the position with reduced educational requirements as offered by the Employer. On remand, the CO is permitted to develop additional evidence if it is believed that full-time employment is not being offered.

Further, we are also concerned that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive. The job requirements include two years of experience in the job duties of Kosher cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Kosher cooking. Therefore, this matter will be remanded with instructions to the CO to consider whether the Employer's requirement of two years of experience in cooking Kosher foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of Occupational Titles* (DOT). On Remand, the CO is also permitted to develop additional evidence if it is believed that full-time employment is not being offered.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED**, and this matter is **REMANDED** for further action consistent with this decision.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, concurring:

I concur with the conclusion reached by the majority. On remand, I would direct the CO's attention, as well as Employer/Alien, to the case of *Teresita Tecson*, 94-INA-014 (May 30, 1995),

wherein it was held that a three-month requirement for experience in Filipino cooking was found unduly restrictive. My research reveals no cases of “specialty” or “ethnic” domestic cook cases decided by the Board to the contrary. In my opinion, the burden of demonstrating that the requirement of an “ethnic” type of cooking such as “kosher cook” for a cook/domestic is high, since as stated in *Tecson*, “The business in this case is the operation of the household.” If an employer “prefers” a certain type of cooking, he can, of course, instruct the cook to do so. However, to require such experience as a part of the job opportunity has a “chilling effect” on U.S. workers who might otherwise be qualified and willing to do the job.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.